occasion was more than an agreement to surrender and that there was a delivery up of possession. He says that the plaintiff is estopped from asserting that the tenancy still subsists.

Now I think it is clear from the authorities that in the absence of writing the mere agreement of the parties to substitute a licence for the tenancy and to allow the plaintiff to stay on as a licensee until he was able to remove to the house which Mr. Baey Kim Swee assured everybody would be ready in a few days would not of itself suffice to produce a surrender by operation of law. There must be some act done by somebody in consequence of the agreement which is inconsistent with the continuance of the tenancy. (*Oastler v. Henderson*[1]). In *Foster v. Robinson*[2] it was verbally agreed between the tenant and the landlord that the tenant could continue to live in the cottage rent free for the rest of his life. Thereafter rent was neither demanded nor tendered. Mr. Smith placed reliance on the following passage from the judgment of the Master of the Rolls at the bottom of page 348 :—

"I think it amounts to this, that the determination of the former tenancy was equivalent to delivery up of possession under that tenancy and a resumption of possession under the new transaction immediately afterwards."

But in that case there was the fact that no rent was paid for four years. Superadded to the agreement was the non-payment of rent, which was inconsistent with the continuance of the tenancy.

In this case it seems to me that not only is there nothing which is inconsistent with the continuance of the tenancy, but that everything which has happened is consistent with it. The rent continued to be paid as before. And there is evidence that up to the start of these proceedings what has been described as a "war of nerves" was going on, in which the defendant's wife, by acts of annoyance such as cutting off the electricity (which she has now given an undertaking not to continue) endeavoured to force the plaintiff to leave. What was the point of it if the plaintiff was a mere licensee unprotected by the Rent Ordinance? But these matters would not be relevant if Mr. Smith is correct in his contention that the plaintiff delivered up possession outside the Fourth Police Court.

Mr. Smith urged upon me another passage from the judgment of the Master of the Rolls in *Foster v. Robinson*[2] at the top of the page of 348, where he puts a hypothetical agreement between a landlord and tenant and goes on to say :—

"If all that were given effect to by a carefully drawn agreement, it seems to me difficult to suppose that the Court would have to say: 'We cannot pay the slightest regard to it'."

In the same way I should pay regard to this verbal agreement (which I find as a fact, on Mr. Tsan's evidence, that the parties made on 18th October, 1950), if it had been given effect to in a written document; because that would have complied with section 3 of the Statute of Frauds. But in the absence of writing, and in the absence of any evidence of some act which was inconsistent with the continuance of the tenancy, I cannot accept the argument that in verbally agreeing to leave the plaintiff was making some notional delivery up of possession, which was analogous to the non-payment of rent in *Foster v. Robinson*[2]. Such an argument seems to me to ignore such authorities as *Oastler v. Henderson*[1] and to be calculated to lead to results which the Rent Ordinance is designed to prevent.

I hold that the plaintiff is entitled to the declaration asked for in item 3 of his claim.

I now come to the question of costs. A day and a half has been taken up in this Court by the possession issue. As the plaintiff was asking for an injunction it was necessary for him to bring this case in the High Court. But the issue of possession could have been tried in the District Court. And the proper party to raise the issue, if he thought fit, was the defendant. The plaintiff was in possession. In raising the issue in this Court he has increased the costs in these proceedings by raising an issue which might never have been the subject of litigation. But the question of whether the plaintiff was a tenant had been raised in the correspondence, and his claim for a declaration has been contested here. Also in a letter dated 9th December, written when negotiations for a settlement were going on, the plaintiff's solicitors suggested to the defendant's solicitors that it would be open to them to remit these proceeedings to the District Court for the trial of the possession issue and that the costs so far incurred in the High Court should follow the event in the District Court. In all the circumstances I think the proper order is that he should have the costs of the possession issue on the District Court scale.

Order accordingly.

Solicitors : *Battenberg & Talma; Donaldson & Burkinshaw.*

ABDUL AZIZ BIN HAJI PUTEH v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) August 26, 1954]

[Penang — Criminal Appeal No. 26 of 1954]

Road Traffic — Motor Vehicles (Driving Offences) Proclamation, s. 12(2) — Statement made under —

Criminal Procedure Code (Cap. 21), s. 117 — Penal Code, s. 304A — Negligence.

The appellant in this case was convicted and sentenced to nine months' imprisonment on a charge of causing the death of two persons by doing a rash act not amounting to culpable homicide, to wit, by driving his motor car rashly, an offence punishable under s. 304A of the Penal Code.

One of the grounds of appeal was that the learned President should not have admitted the report made by the accused on the ground that it was a statement made in the course of police investigation.

The material facts regarding this point were that immediately after knocking down the two deceased the accused drove straight to the Police Station at Balik Pulau and there made a report of the accident. This statement was not taken down in writing at the time and the report which was put in evidence, purported to have been made the following morning and was said to have been written out by the accused himself.

Held: the report under s. 12(2) of the Motor Vehicles (Driving Offences) Proclamation made immediately after the accident should be taken down in writing under the provisions of s. 117 of the Criminal Procedure Code, and the omission to do this cannot render the subsequent fuller report admissible.

CRIMINAL APPEAL from the Sessions Court.

O. L. Phipps for the appellant.

D. C. Jackson (Senior Federal Counsel) for the respondent.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Spenser Wilkinson J. : — The appellant was tried in the Sessions Court at Balik Pulau upon an amended charge which reads as follows :—

"You are charged that you on the 16th day of April, 1954 at about 8.00 p.m. at Pulau Betong Road, Balik Pulau caused the death of Osman bin Hitam and Chew Hock Choon by doing a rash act not amounting to culpable homicide, to wit, by driving your motor car No. P. 4938 rashly and that you have thereby committed an offence punishable under Section 304A of the Penal Code."

Upon this charge the appellant was convicted and sentenced to nine months' imprisonment. After hearing the arguments I came to the conclusion that there was ample evidence upon which the learned President could find as he did that the requisite degree of rashness to support a charge under section 304A had been made out.

As requested, however, by Counsel I give short grounds of decision because a point of perhaps some importance arose out of the Appeal. One of the grounds of appeal was that the learned President should not have admitted the report made by the accused, Ex. P. 6 on the ground that it was a statement made in the course of police investigation.

The material facts regarding this point are that immediately after knocking down the two deceased the accused drove straight to the Police Station at Balik Pulau and there reported to the Police Inspector that he had had an accident. This statement was not taken down in writing at the time and the report, Ex. P. 2, which was put in evidence, purports to have been made at 10.05 a.m. the next morning and is said to have been written out by the accused himself.

Dealing with the question of the admissibility of this report the learned President in his grounds of decision says :—

"I admitted this report because I considered that although a police investigation had started this statement was made as a result of a statutory obligation. Without it, in many cases the hit and run driver would escape. I think one can differentiate between a statement made under Section 12(2) and the ordinary statement taken during the course of investigation since that under Section 12(2) is volunteered and made under a statutory obligation and need not (indeed should not) contain more than a bare report of the accident, whereas the other is usually elicited on questioning by the police."

In my opinion the exhibit P. 6 should not have been admitted. Section 12(2) of the Motor Vehicles (Driving Offences) Proclamation contains no exception to the provisions of section 124 of the Criminal Procedure Code, and the only exceptions contained in the latter section are statements falling within section 27 or 32(1) of the Evidence Ordinance. If, therefore, police investigation has started before the report is made under section 12(2) of the Proclamation then in my opinion in view of the decided cases on this subject that report is inadmissible.

This, however, is not what really happened in the present case. The report under section 12(2) was, in fact, made by the accused immediately after the accident and should have been taken down in writing under the provisions of section 117 of the Criminal Procedure Code, and the omission to do this cannot in my opinion render the subsequent fuller report admissible.

I would also comment that whilst the report under section 12(2) need not contain more than a bare report of the accident the same is true of any other report, and if other reports are usually elicited by questions by the police, this is merely a matter of convenience, due in most cases to the illiteracy of the person reporting.

As stated by the learned President the admission of the particular statement in this case made no difference to the case, because the admissions made by the accused to the witness, Mohamed Zain in the presence of the Police Inspector were clearly admissible to prove that he was the driver.

With regard to sentence, whilst I was unable to agree with the learned President that the passing and re-passing of a motor bus by the accused before the accident indicated that the accused was in a peculiar state of mind I was unable to say that the sentence imposed was manifestly excessive, and I saw no reason, therefore, to interfere with it.

Order accordingly.

Solicitors for the appellant: *Hogan, Adams & Allan.*